Sonic Automotive, formerly d/b/a Capitol Ford, currently d/b/a Friendly Ford *and* International Association of Machinists & Aerospace Workers, District Lodge 190, Local Lodge No. 1101, AFL–CIO. Case 32–CA–19327–1

December 16, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On February 28, 2003, Administrative Law Judge James M. Kennedy issued the attached decision. International Association of Machinists & Aerospace Workers, District Lodge 190, Local Lodge No. 1101, AFL–CIO (the Union) filed exceptions and a supporting brief, and the General Counsel filed a limited exception. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.

1. We adopt the judge's dismissal of the complaint allegation that the Respondent made statements threatening employees in violation of Section 8(a)(1) of the Act. The judge made a credibility resolution that the alleged statements were not in fact made, and we adopt the judge's credibility resolution.[1] We accordingly find it unnecessary to pass on the judge's alternative finding that, even if the statements were in fact made, they did not constitute unlawful threats violative of Section 8(a)(1) of the Act.

2. The judge found, and we agree for the reasons set forth in his decision, that the Respondent, an undisputed *Burns*[2] successor employer, did not violate Section 8(a)(5) of the Act by unilaterally implementing the October 2001 productivity bonus program, and thereafter unilaterally modifying the bonus program. As the judge fully explained, neither the introduction of the October 2001 bonus program without bargaining with the Union, nor the subsequent modification of the bonus program, constituted changes in unit employees' terms and conditions of employment. Thus, the record shows that similar bonus programs were utilized by Respondent's predecessor, and this discretion was authorized under the union-predecessor collective-bargaining agreement. Accordingly, the discretionary use of such programs at the employer's initiative was one of the existing terms and conditions of employment that governed the Respondent's relationship with its employees after it took over the business from the predecessor employer. The fact that the contract was not in effect vis-à-vis the Respondent does not mean that the practice was no longer in effect. The practice was that the predecessor could act on bonuses at its discretion. The Respondent continued that practice and, under that practice, acted on bonuses.[3] In addition, the Union did not object and indeed encouraged such bonus programs by both the Respondent and its predecessor. In sum, the judge correctly concluded that "the [bonus] system had been in place before Respondent acquired the facility and it simply utilized it in the same fashion the Predecessor had."[4] We also agree with the judge's further finding, for the reasons set forth in his decision, that the Respondent did not engage in unlawful direct dealing with employees with respect to the October 2001 bonus program.

3. We further agree with the judge, as set forth in his decision, that the Respondent did not violate Section 8(a)(5) of the Act by unilaterally implementing two paid holidays: the day after Thanksgiving and the day of Christmas Eve. The judge correctly found that the initial terms and conditions of employment established by the

[1] The Union has excepted to the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

[3] Our colleague is correct in saying that a successor employer who does not adopt the predecessor's contract cannot rely upon the management rights clause of that contract to justify unilateral action. However, the instant case involves the predecessor's *practice* of acting unilaterally with respect to bonuses. The Respondent was privileged to continue that practice, and did so in this case. Contrary to our colleague, the mere fact that that the past practice was developed under a now-expired contract does not gainsay the existence of the past practice. The Respondent's reliance on its predecessor's past practice is not dependent on the continued existence of the predecessor's collective-bargaining agreement.

Further, while our colleague relies on *Ironton Publications*, 321 NLRB 1048 (1996), in support of his assertion that the Union's contractual waiver of its right to bargain over bonus programs did not outlive the contract, his reliance is misplaced. As discussed above, the instant case involves a successor employer who continued the practice of its predecessor in regard to the granting of bonuses.

[4] Accordingly, we disagree with our dissenting colleague's contention that the evidence is insufficient to establish the past practice of unilaterally implementing and modifying bonus programs on which the Respondent relied.

Respondent encompassed the latter holiday. With respect to the former, we recognize that the Respondent, upon taking over, announced that there would be no holiday on the day after Thanksgiving. However, this announcement was never implemented because, prior to Thanksgiving, the Respondent announced that there would be a holiday on the day after Thanksgiving. And, that holiday was given. Thus, there was no change from the predecessor's established practice of granting the day after Thanksgiving as a paid holiday. We additionally agree with the judge's further finding, as set forth in his decision, that the Respondent did not engage in unlawful direct dealing with employees with respect to these holidays.

4. The General Counsel and the Union have excepted to the remedy recommended by the judge for his finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the unit employees' payroll period, and dealing directly with unit employees on this matter.[5] The General Counsel and the Union contend that the appropriate remedy should direct that the Respondent, on request of the Union, to rescind its unilateral change in the payroll period. We find merit in the exceptions of the General Counsel and the Union under Board precedent. See *S & I Transportation, Inc.*, 311 NLRB 1388, 1391 (1993); *South Carolina Baptist Ministries*, 310 NLRB 156, 192, 193 (1993). We shall modify the judge's remedy accordingly.[6]

ORDER

The National Labor Relations Board adopts the recommended Order[7] of the administrative law judge as modified and set forth in full below and orders that the Respondent, Sonic Automotive, formerly d/b/a Capitol Ford, currently d/b/a Friendly Ford, San Jose, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union as the exclusive bargaining representative of its employees, in the bargaining unit set forth below, by unilaterally changing the payroll period.

(b) Dealing directly with bargaining unit employees with respect to their rates of pay, wages, hours, or other terms and conditions of employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of the Union, rescind the unilateral change in the payroll period.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full-time and regular part time automotive machinists; automotive mechanics; automotive diesel engine mechanics; automotive electrical machinists; automotive welders; automotive fender, body, and radiator mechanics; automotive trimmers; automotive sprayers, color matchers, and stripers, sanders and rubbers; apprentices or trainees; service writers; and dispatchers employed by Respondent at its San Jose, California facility; excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

(c) Pay to the bargaining unit employees the 2 days' wages placed in the holdback account in January 2002, with interest, in the manner set forth in the remedy section of the judge's decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in San Jose, California, copies of the attached notice marked "Appendix."[8] Copies of the notice, on

[5] No party filed exceptions to these unfair labor practice findings. The Respondent improperly attempted to address these findings in its brief in answer to the exceptions of the Union and the General Counsel. It is well established, however, that the "answering brief to the exceptions shall be limited to the questions raised in the exceptions and in the brief in support thereof." NLRB Rules and Regulations Sec. 102.46 (d)(2).

[6] "Pursuant to the Board's established policy, in cases such as this involving a violation of Sec. 8(a)(5) based on an employer's unilateral alteration of terms and conditions of employment, it is customary to order restoration of the status quo ante to the extent feasible." *Detroit News*, 319 NLRB 262 fn. 1 (1995). The Respondent will have the opportunity in the compliance phase of this proceeding to demonstrate that the rescission remedy is unduly burdensome.

[7] We have modified the judge's recommended Order to reflect the appropriate remedy discussed above, to conform to the violations found, and to correct certain inadvertent errors. We have substituted a new notice to comport with these modifications.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 9, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 16, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, concurring in part and dissenting in part.

I agree with my colleagues' decision except with respect to the following two issues:

I. The Respondent Violated Section 8(a)(5) By Unilaterally Modifying the Productivity Bonus Program It Implemented in October 2001

The Union had no objection to the productivity bonus program that the Respondent initially implemented in October 2001. But then the Respondent modified the program without bargaining with the Union.

The Respondent was not privileged to unilaterally modify the bonus program it put into effect. Although the collective-bargaining agreement between the Union and the predecessor allowed the predecessor to institute similar bonus programs, that agreement is no longer in effect. Therefore, even assuming the predecessor's contract embodied a valid waiver of the Union's statutory right to bargain, the waiver did not outlive the contract that contained it. See *Ironton Publications*, 321 NLRB 1048 (1996).[1] Further, the evidence is insufficient to establish a past practice of unilaterally implementing and modifying bonus programs subsequent to the effective date of the predecessor's contract. Therefore, although the Union did not object to the initial implementation of the October 2001 bonus program, the Union's acquiescence in that unilateral change does not constitute a waiver of its right to bargain over subsequent modifications to the program. See *Owens-Corning Fiberglas*, 282 NLRB 609 (1987) ("A union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time.") For these reasons, the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally modifying the productivity bonus program it implemented in October 2001.

II. The Respondent Violated Section 8(a)(5) By Unilaterally Implementing the Day After Thanksgiving Holiday and By Dealing Directly With Employees.

The Respondent's implementation of the day after Thanksgiving holiday was a change from the Respondent's initial terms and conditions of employment. The Respondent never bargained with the Union about the change. It makes no difference that the unilateral change was a benefit to employees. See *Register-Guard*, 339 NLRB 353, 359 (2003). Further, the Respondent met directly with employees regarding the change and entirely excluded the Union from the process. Unlawful direct dealing is accordingly established. See *Georgia Power Co.*, 342 NLRB No. 18, slip op. at 3–4 (2004) (Member Walsh dissenting).

[1] The judge's reliance on *Holiday Inn of Victorville*, 284 NLRB 916 (1987), is misplaced. That case sets forth the general rule in successorship situations that "the terms and conditions of employment of union-represented employees will *normally* be those established by the predecessor's collective-bargaining agreement." (Emphasis added.) However, as the Board went on to explain in the following paragraph, a contract clause in a predecessor's contract authorizing unilateral action with respect to a mandatory bargaining subject is "not a term and condition of employment in the same sense." A successor employer who does not adopt the predecessor's contract "cannot as a general proposition rely" on such a clause to act unilaterally. Id. In *Holiday Inn of Victorville*, the Board was referring specifically to a management-rights clause, but the Board's reasoning is equally applicable here where the contractual reservation of management discretion in the predecessor's contract concerned bonus programs.

The majority errs in relying on the predecessor's past practice. As stated above, the contractual provision under which the predecessor acted unilaterally with respect to bonuses is no longer in effect, and any union waiver of the statutory right to bargain did not outlive the contract that contained it. Under these circumstances, the predecessor's past bonus programs, implemented under a contractual provision that is no longer in effect, do not establish a past practice allowing the Respondent to modify the productivity bonus program in issue here without bargaining with the Union.

Dated, Washington, D.C. December 16, 2004

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with the Union as the exclusive bargaining representative of our employees, in the bargaining unit set forth below, by unilaterally changing the payroll period.

WE WILL NOT deal directly with our employees with respect to their rates of pay, wages, hours, or other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, on request of the Union, rescind our unilateral change in the payroll period.

WE WILL, before implementing any changes in your wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

All full-time and regular part time automotive machinists; automotive mechanics; automotive diesel engine mechanics; automotive electrical machinists; automotive welders; automotive fender, body, and radiator mechanics; automotive trimmers; automotive sprayers, color matchers, and stripers, sanders and rubbers; apprentices or trainees; service writers; and dispatchers employed by us at our San Jose, California facility; excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

WE WILL pay to our bargaining unit employees the two days' wages we placed in the holdback account in January 2002, with interest.

SONIC AUTOMOTIVE, FORMERLY D/B/A CAPITOL FORD, CURRENTLY D/B/A FRIENDLY FORD

Valery Hardy-Mahoney, for the General Counsel.
Robert G. Hulteng and *Philip R. Paturzo (Littler Mendelson,* of San Francisco, California, for the Respondent.
David A. Rosenfeld (Van Bourg, Weinberg, Roger & Rosenfeld), of Oakland, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in San Jose, California, on September 18, 2002,[1] based upon a complaint issued March 22 by the Acting Regional Director for Region 32. The underlying unfair labor practice charge was originally filed by the International Association of Machinists & Aerospace Workers, District Lodge 190, Local Lodge No. 1101, AFL–CIO, on January 7, subsequently amended on March 22. The complaint alleges that Sonic Automotive formerly d/b/a Capitol Ford, currently d/b/a Friendly Ford (Respondent) violated Section 8(a)(1) and (5) by making various unilateral changes in working conditions and simultaneously engaging in direct dealing with the employees rather than going through the Union. It also asserts that Respondent committed two independent violations of Section 8(a)(1) by threatening an employee because of his union activities. Respondent denies the allegations.

Issues

The independent 8(a)(1) allegations assert that Respondent, on two occasions, acting through two different supervisors, threatened Union Steward Keith Scarboro with discharge as a reprisal for his union activities. Respondent denies the incidents and argues that, in any event, one of the individuals is not the supervisor as defined in Section 2(5) of the Act. With respect to the 8(a)(5) allegations, the complaint asserts that Respondent breached the bargaining obligation in four different respects: (1) modifying a productivity bonus program in October or November 2001; (2) changing its policies regarding paid holidays for the Friday after Thanksgiving 2001; (3) Christmas Eve 2001; and, (4) on January 9 changing the pay periods. Respondent defends on several grounds, including de minimis, waiver, no change occurred, and, in the case of the pay period change, that it was only an administrative change not affecting employee working conditions.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine wit-

[1] All dates are 2002 unless stated otherwise.

nesses, to orally argue, and to file briefs. The General Counsel, the Charging Party, and Respondent have all filed briefs, which have been carefully considered. Based on the entire record of the case, as well as my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

According to the pleadings, Respondent is a California corporation[2] with an office and place of business in San Jose, where it operates an automobile dealership and where it sells and services new and used motor vehicles. It admits that during the calendar year beginning May 8, 2001, in the course and conduct of its business it has derived gross revenues exceeding $500,000 and during the same period it has purchased and received goods originating outside California valued in excess of $5000. Accordingly, it admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It further admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

a. The setting

On May 8, 2001, Respondent took over the Ford dealership located on West Capitol Expressway in San Jose known as Capitol Ford.[3] At the time of the takeover, Capitol Ford had been a member of a multiemployer association and bound to a master collective-bargaining agreement with the Union, which was not scheduled to expire until October 31. The General Counsel and Respondent both agree that Respondent is a successor employer within the meaning of the Supreme Court's decision in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). As such, it was obligated to recognize the Union, and it did so. At the same time, it was not required to accept the predecessor's collective-bargaining contract; instead, it was free to set its own initial terms and conditions of employment for those employees in the bargaining unit. It did that as well.

The bargaining unit, not in issue here, covers the automotive machinists, mechanics bodyshop workers, painters, service writers, and dispatchers but excludes auto sales personnel and other appropriate exclusions. Respondent, upon its takeover, issued its own employee handbook and immediately signed a recognition/interim agreement.[4] The parties, pursuant to that recognition agreement, as of the date of the hearing, had not yet reached an agreement. They had nevertheless engaged in extensive bargaining, including eight meetings during 2002 and five meetings in 2001. The complaint does not allege that Respondent has engaged in bad-faith bargaining during any of those negotiations.

As part of its initial terms and conditions, Respondent established a pay scale known as the "Sonic package" (not in evidence). This system of recompense set levels under both hourly and flat-rate calculations. Both Respondent and the Union considered those levels as minimums, and overscale wages were allowed. In fact, Business Agent Glenn Gandolfo testified that the predecessor's collective-bargaining contract expressly permitted overscale wages. He also testified that during a bargaining session in October 2001 the Union had become aware that Respondent was paying wages over the initially established scales and the Union did not object to the practice. It is reasonable, I think, to conclude that the Union's policy is to encourage employers to pay workers beyond the minimums established, whether based on a collective-bargaining contract, initial flat, experience, or to reward demonstrated excellence.[5]

Consistent with that policy, the Union does not appear to oppose bonuses or other types of remuneration. Although occurring some 10 months after the incentive plan under scrutiny here, Gandolfo wrote Respondent a letter on August 30 encouraging pay raises for the bargaining unit based on "length of service, change of class, or proven ability." He went on to say that the Union would not take action against the Company during negotiations because of such a grant. He added that likewise, the Union did not oppose the grant of "bonuses, spiffs, or other remuneration given by the manufacturer or the company."

Among other things, the handbook established eight paid holidays, one of which was a day, which could be scheduled by the department manager between December 24 and January 2. The named holidays included Thanksgiving Day and Christmas Day. Neither the day after Thanksgiving nor Christmas Eve was listed. Those omissions were a departure from the predecessor's collective-bargaining contract, which had specifically granted the day after Thanksgiving and Christmas Eve as paid days off.

During the period in question here, Respondent's general manager was Gary Potter,[6] its service manager was Andrew McDonald, the maintenance and detail manager was Omar Infante, and the used car reconditioning person was John Swarthout. Respondent acknowledges the supervisory status of Potter, McDonald, and Infante. It asserts that Swarthout is not a supervisor within the meaning of Section 2(11) of the Act. Both Infante and Swarthout are alleged to have said things which allegedly violated Section 8(a)(1) of the Act. The individual to whom the remarks were supposedly directed was Keith Scarboro. Scarboro had been a longtime employee with Capitol Ford, originally hired in 1989 and, except for a short

[2] The dealership in question is part of a national chain of dealerships. Testimony shows it to be one of approximately 180 dealerships owned by Sonic Automotive whose headquarters are in Charlotte, North Carolina.

[3] Respondent continued to do business under the Capitol Ford trade name for almost 6 months before converting to its current trade name, Friendly Ford.

[4] The recognition agreement not only included an affirmative agreement to meet and bargain in good faith, it committed Respondent to make contributions to the pension fund and health plan.

[5] Gandolfo's testimony:

> Q. BY MR. HULTENG: And in dealings with this employer, have you in fact informed the employer that the union does not oppose the granting of any above scale paid to employees?
>
> A. [WITNESS GANDOLFO] Yes.

[6] At some point after the events recounted here, Potter became the regional director of used cars for the nine Sonic dealerships in the North Bay. He is no longer resides in northern California, living now in Payson, Arizona, and commuting to California three times a week.

hiatus in the early 1990s, had worked continuously at the facility until he quit in November 2001. For some period of time prior to his departure he had been the union steward. He was succeeded as steward by Rod Stamps. Both of those individuals testified in support of the General Counsel's case.

b. Scarboro's testimony

As noted, Keith Scarboro was the Union's longtime steward. He was also a member of the Union's negotiating committee. Respondent had retained him when it took over the dealership. He was a technician assigned to the used car reconditioning operation, which was run by John Swarthout. Scarboro said that sometime during October, he was in Swarthout's office picking up a work order. He testified Swarthout arose from his desk, checked to make certain no one was listening and closed the office door. Swarthout then told Scarboro "Hey, by the way, watch your ass man, because they want to get you."

Similarly, at about the same time, Scarboro says he was near his work area walking toward the parts department when he encountered Detail Manager Omar Infante. He says Infante told him "You know, watch your ass man, they're out to get you, watch your ass." When Scarboro asked Infante what he meant, Infante replied, "You know what they say: Cut off the head and the body will fall." Scarboro says he asked Infante where he had heard that from. Infante replied, "Potter."

Neither of these statements has any particular context, although when pushed for more information, Scarboro said Swarthout's comment came after they had been talking about contract negotiations. Even with that addition, specific context is wanting. Infante is Scarboro's longtime personal friend and coworker. Swarthout had been put in charge of used car reconditioning upon the May takeover, but he had previously worked at the dealership as a parts man. Both were on very good terms with Scarboro.

Swarthout denied that such a conversation had occurred. According to him, he has never heard Potter or any manager say they were looking to get rid of Scarboro. Infante denied ever having such a conversation with Scarboro, specifically saying that he never told Scarboro to "watch his ass" or making a remark to the effect that if you cut off the head, the body will fall.

In assessing the relative credibility of these witnesses, one cannot ignore Scarboro's intense dislike of Respondent. Respondent's counsel asked why he had voluntarily terminated his employment and Scarboro replied, without much explanation, that he "wasn't going to work for these people after what had been going on for seven, eight months." He explained that "these people" referred to the Sonic management, apparently particularly those who were negotiating the new collective-bargaining contract. He agreed that he "absolutely" disliked Sonic and the people associated with it. His rancor, like his testimony, has little context. Whatever the source of his negative attitude toward Respondent, it has not been articulated in the record. Even so, his bitterness is striking.[7]

Scarboro's approach to describing what occurred is in sharp contrast to the matter-of-fact approach taken by both Swarthout and Infante. Furthermore, Potter credibly testified that the phrase "cut off the head and the body will fall" is not an expression that he uses. He denied telling Infante any such thing and Infante agrees. Based on demeanor alone, it is difficult to credit Scarboro. Given the lack of context and his testimony that these remarks came out of the blue, the probability of such an occurrence is low. Furthermore, the General Counsel needed to lead Scarboro to the specific conversations.

It seems to me that Scarboro's clear bias renders his testimony suspect. Coupled with its other shortcomings, I am unable to credit him. Accordingly, I find the evidence to be insufficient to support an 8(a)(1) violation. Moreover, even if one credits Scarboro's testimony, it is difficult to assign a discriminatory meaning to the words. I find the phrases used, "watch your ass" and "if you cut off the head, the body will die," are very ambiguous in the circumstances. Certainly they are not connected to union activity, except by innuendo. Other innuendos might well be fashioned, too. To draw the conclusion which the General Counsel wishes is too much of a reach, given Scarboro's inability to put the phrases in any sort of context. There is no evidence that Scarboro had done anything to warrant Potter's attention and certainly no evidence that either Infante or Swarthout harbored any union animus of their own. Therefore, no context, and certainly no antiunion context, may be reasonably inferred. These statements simply do not amount to interference, restraint, or coercion as required by Section 8(a)(1). The allegation should be dismissed. Accordingly, there is no reason to determine whether Swarthout was a statutory supervisor through whom Respondent may be charged with an unfair labor practice.

c. The October 2001 productivity bonus

The complaint alleges that in late October or early November 2001, Respondent 'modified' the productivity bonus program which had been established for October. In her brief, counsel for the General Counsel seems to be modifying the complaint's theory. She argues, without moving to amend, that Respondent unilaterally implemented the program in violation of Section 8(a)(5), not just that it modified the program as alleged. Neither does she acknowledge any theory change. The testimony, as taken, focused solely on the modification.[8]

The record demonstrates that both before and after the bonus program under scrutiny here, both the predecessor[9] and Respondent had run similar incentive events. The employees were familiar with the terminology and the practice from their experience with the predecessor, and Respondent had main-

[7] Neither Potter nor McDonald were members of Respondent's negotiating team. According to Mike Cervantes, regional fixed operations director for Sonic, their exclusion from collective bargaining was by corporate design. It seems, therefore, that Scarboro's resentment was aimed at the negotiators, perhaps because of what he perceived as lack of progress.

[8] An example is the question she propounded to the Union's business representative:

> BY MS. HARDY-MAHONEY: Did the union ever agree that a bonus program that was implemented in October 2001 could be *modified* in any way?
>
> A [WITNESS GANDOLFO]: No. I never even knew.

[9] The predecessor's collective-bargaining contract, art. XII, specifically authorized it to institute an incentive pay program.

tained a service advisor bonus program already in effect, albeit with some slight modification. Technicians were also eligible for a $500 recruiting bonus in the event they were able to recruit a new mechanic who lasted 90 days with the dealership. And, although, not of significant value, in August 2001 it had taken the staff out for pizza and beverages consistent with a promise to do so in the event the dealership reached a gross profit level of $325,000 for that month. None of these bonuses or programs was negotiated with the Union.

In October 2001, Potter announced the so-called, "Big Dog Contest," an incentive program aimed at the service technicians. He said that a $5000 "kitty" was being created which could be divided among all the qualifying employees. Originally, to qualify, the technicians had to be 90-percent productive during October and the service department gross profit had to reach 70 percent. The modification occurred when Service Director Andrew McDonald and Potter realized that even though a number of employees were close to reaching the program's targets, the 70-percent gross profit level would not be met, and that few, if any, of the employees would reach the 90-percent productivity rate. Furthermore, McDonald had heard that some of the employees were supposedly thinking of sabotaging the program by unclear means. He reported what he had heard to Potter. As a result of all that information, Potter decided to try to save the program. He knew the staff was close to the 70-percent level and he knew that a number of the employees were working very hard. He could see that he had nine employees who were over the 90-percent level and that the productivity of four others had shown a marked increase although they were not yet at the 90-percent rate. Even though he knew he was diluting the number of "winners," he wanted to find a way to reward those who had made significant progress. He also knew, because the 70-percent gross profit target had not been reached, if he followed the program's announcement to the letter, there would be no "winners" at all. He decided to include every technician who had either reached the 90-percent mark or who had shown marked improvement. After all, he reasoned, he was trying to induce and reward better performance. As result, he selected 13 employees who met the modification to divide the $5000 pot equally. Each of those thirteen received a bonus of $384.62. He did not tell the mechanics that the program had been modified to improve everyone's eligibility; he just announced the recipients.

d. The two paid holidays

Article VII of the predecessor's collective-bargaining contract listed a number of contractual paid holidays for the service department employees. These included the Friday following Thanksgiving and the day before Christmas Day (Christmas Eve). These holidays had been in the collective-bargaining contract for many years. Indeed, since it was a multiemployer association contract covering a number of South Bay dealerships, those holidays had become part of the auto mechanics' culture. When Respondent acquired this dealership, its employee handbook established for the service department employees eight paid holidays. Neither the Friday after Thanksgiving nor Christmas Eve was included. It did allow for an additional holiday to be scheduled by management between December 24 and January 2. It also allowed for a floating holiday.

Although the dates are not specific, sometime in mid-November 2001, Respondent posted the work schedule for the day after Thanksgiving. Consistent with its employee handbook it had begun taking service appointments for that day. That posting cause an immediate uproar within the technicians' ranks. Their dismay resulted in a meeting conducted by Service Director McDonald. Both he and Shop Steward Rod Stamps agree that the entire staff voiced intense opposition to working that day. The employees observed that the day after Thanksgiving had been holiday for about 25 years. McDonald remembers hearing a strong undercurrent from employees to the effect that they would not work that day. His recollection is confirmed by Stamps' testimony. Stamps agreed that he told McDonald that the employees would not work on the Friday after Thanksgiving. McDonald informed Potter and after learning that the only service departments on the Capitol Expressway to be open that Friday were at a Nissan dealership owned by Sonic and a Toyota dealership. While the record does not reflect the number of auto dealerships on that road, it is clear that it is an auto row with a large number of similar businesses. Upon learning that, Potter decided that it was in the best interest of the dealership to close the service department that day and, to keep a happy work force, he would pay the service staff for 8 hours' work that day. The Company did so.

A similar incident occurred for Christmas Eve. On December 7, 2001, Respondent issued a memo to its employees setting forth the service department work schedule for Christmas and New Years. Stamps described a near identical uprising. Again, the employees threatened not to work. This time Respondent exercised its right under the employee handbook and announced that Christmas Eve was the additional holiday, which it had reserved under its rule. Respondent also paid the service department employees 8 hours' pay for the Christmas Eve holiday.

e. The pay period/payday change

When Respondent took over the operation from the Predecessor in May 2001 it established a local payroll system. All of the data was collected locally and paychecks were written at the dealership. At that time its pay period ran from Wednesday to Tuesday. Paychecks were distributed that Friday. As noted above, Respondent is just 1 of over 180 dealerships nationally operated by Sonic Automotive, which is headquartered in Charlotte, North Carolina. For administrative reasons, the national headquarters had determined to centralize its payroll from Charlotte. It established a web-based payroll system and in the first part of 2002, imposed it upon Respondent.[10]

On January 9, Potter conducted an employee meeting and announced that the dealership was changing the pay period.

[10] That change required all dealerships, including Respondent, to collect the payroll data and transmit the information electronically to an Atlanta payroll processor. Respondent now sends that information to Atlanta every Monday. The Atlanta processor then creates the paychecks and sends them out each Tuesday by an overnight express company, arriving in San Jose on Wednesday. Since payday is Thursday, that system allows for a 1-day cushion in the event the express company's delivery is delayed.

The new pay period was to begin on Sunday and end on Saturday; paychecks were to be distributed the following Thursday. He explained that this change would mean that on the first payday under the new system, Thursday, January 10, the employees would receive a 3-day paycheck. It was to cover work performed on January 2, 3, and 4, the Wednesday, Thursday, and Friday of the previous week, but not January 7 and 8, the Monday and Tuesday of the old cycle, days which had now been moved to the new pay cycle beginning Sunday, January 6.

Steward Rod Stamps and most of the technicians protested and said they did not want to change the pay period because it would result in their losing 2 days' pay (from that paycheck). They became very upset and Potter decided that he needed to discuss the matter at a higher level within the Company. Later that afternoon Potter and McDonald resumed the meeting. Recognizing that short paychecks might result in some hardships, Potter said that for those employees who were interested, the Company would allow them to "draw" against future wages to make up for the shortage. They were to pay back the draw over the next four checks, by having 4 hours' wages deducted each of those weeks.

Over half of the employees accepted Potter's offer; the remainder did not. The others, including Stamps, refused to accept the 3-day check. Those who accepted the offer received two checks roughly equalling a full week's pay.

The 2 days' pay, representing January 7 and 8, is now carried as part of the holdback. Holdback is the amount of money held by an employer between the end of the pay period and the day the paycheck is issued. Previously, this dealership's holdback was from Tuesday to Friday, a holdback of 3 days. Under the new system the holdback is from Saturday to Thursday, a holdback of 5 days. Nonetheless, the two unpaid days continue to roll forward. According to Respondent, those days will be paid whenever an affected employee separates from the Company.

III. ANALYSIS AND CONCLUSIONS

The independent 8(a)(1) threat allegations have been dismissed on their facts above. I now proceed to the 8(a)(5) contentions. The first is the unilateral change allegations.

As noted in the introductory portion of the decision, Respondent has acknowledged its successor status within the meaning of *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). To that end, it took advantage of the opportunity and set its initial terms and conditions of employment; it also signed an interim agreement with the Union, recognizing the Union as the 9(a) exclusive collective-bargaining representative of the service department employees.

Since *NLRB v. Katz*, 369 U.S. 736 (1962), it has been an unlawful under Section 8(a)(5) for an employer to circumvent its bargaining obligation with the 9(a) representative of its employees by making unilateral changes in their wages, hours, and terms and conditions of employment. The Supreme Court relatively recently reiterated that rule of law. In *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 at 198 (1991), the Court quoted itself to say: "[A]n employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment."

Initially, there is always the question of whether a change has actually occurred. Therefore, one must first find a benchmark, the place from which the new status must be measured. Second, the rule is not without its exceptions. For example, the rule does not apply in cases of waiver (*Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)) or insignificance (*Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976)).

In successor situations such as this, the Board has held that the predecessor's terms and conditions of employment, particularly those established by collective bargaining, are to be recognized as the starting point, i.e., the benchmark. In *Holiday Inn of Victorville*, 284 NLRB 916 (1987), the Board said:

> Except for matters on which a successor employer sets its own initial terms, the terms and conditions of employment of union-represented employees will normally be those established by the predecessor's collective-bargaining agreement or by the predecessor acting unilaterally to the extent that the union had waived bargaining. Practices thus established are the existing practices. They are kept in place simply by virtue of Section 8(a)(5) of the Act rather than by force of contract, however, because a successor employer is not bound to adopt a predecessor's collective-bargaining agreement. [Citing *Burns.*]

Therefore, following *Holiday Inn of Victorville*, the benchmark from which we begin our analysis is the terms and conditions established by the collective-bargaining contract to which the Predecessor was bound, albeit as modified by the initial terms and conditions announced by Respondent when it took over the dealership. Therefore, the benchmark here is two-fold: (1) the initial terms and conditions set by Respondent to the extent that they are actually new or that they modified the Predecessor's terms; and (2) the predecessor's terms and conditions which Respondent did not seek to modify. Therefore, there is a mix of both old and new.

Insofar as the productivity bonus is concerned, there is no doubt that the Predecessor utilized productivity bonus programs in much the same fashion as Respondent did here. This was not a departure of any kind. The employees were familiar with such programs from their experience with the predecessor. It was an established term and condition which preceded Respondent's takeover and was unaffected by the new employee handbook or the recognition agreement; it was left over from the predecessor.

Therefore, when Respondent announced the "Big Dog" incentive, it was not making any sort of change; it was following a procedure established many years before by the predecessor. To the extent that the General Counsel is claiming (via a sub silentio complaint modification) that the establishment of the program was a change, the contention is without merit. Similarly, since Respondent had the right to set the incentive program's rules, it was likewise free to modify those rules so long as it maintained its fundamental goal. When Potter realized that none of the employees would qualify under the original announcement, he knew his goal of better productivity would be defeated, for he would be perceived to have set the bar too high. From an employee perception, if no technician could prevail and win the bonus, the goal would be regarded as un-

achievable. Moreover, Respondent, their new employer, would make itself out as parsimonious, if not dishonorable. Potter could not allow that to happen, for he understood that employee morale is critical to a successful business enterprise. He knew that if he denied the prize in its entirety, the employees would not only be disappointed, they might well become disgruntled. As far as he was concerned, the $5000 kitty had already been committed toward improved productivity/morale and it would only have a negative effect if it were not spent as intended.

Knowing that he had the right to set the rules for winning, Potter believed, correctly in my view, that he also had the right to make certain that the program succeeded. Therefore, he had the power to cure any defect so long as the program maintained its primary purpose, improving productivity. In the final analysis, this incentive program was nothing more than a management tool to improve efficiency. It is accurate to say that the wage component, the winnings, was not the driving purpose of the program. Improving productivity was the principal goal and that the award money was simply an inducement to reach that end. Such a tool has long been recognized by the Union as a legitimate instrument available to management to induce better performance.[11] Accordingly, I find that Respondent did not make any unlawful unilateral change. The system had been in place before Respondent acquired the facility and it simply utilized it in the same fashion that the predecessor had. This allegation will be dismissed.

With respect to the two holidays, the analysis is little different. Here, Respondent did set the initial terms and conditions as they related to paid holidays. The handbook issued simultaneously with the acquisition specifically omitted the day after Thanksgiving and Christmas Eve as paid holidays. Those days had been holidays under the predecessor's collective-bargaining contract with the Union. Respondent's plan was to reduce the number of paid holidays and the handbook reflected that policy. However, in the handbook Respondent had specifically reserved to itself the right to declare a paid holiday during the end-of-the-year holiday season.

At first blush there appears to be no doubt that Respondent changed its initial terms and conditions insofar as the day after Thanksgiving is concerned. In response to both employee complaints and employee threats to refuse to work that day, Potter decided to grant a paid holiday for the day after Thanksgiving. The employees had come to expect that day as a paid holiday and were not willing to accept Respondent's policy. There is no question that Potter considered the employees' vehemence as a genuine threat to the viability of the workweek. Most of the employees said that they would not work that day, and those that did not told McDonald that they wanted to take a vacation day. Both McDonald and Potter realized that the Friday service department appointments could not be met. This meant there was a dual problem. First, they knew there would be customer repercussions that Friday in the event customers brought their automobiles in for service pursuant to an appointment which would then be dishonored. Second, in the event the employees carried out their threat, there was very little Respondent could do about it. It risked losing the entire staff if it disciplined them for not coming to work that day. Indeed, discipline would have been counterproductive (and possibly unlawful under Section 8(a)(1)). Again, seeking to make the best of a bad situation, Potter decided that it was premature to impose Sonic's policy. The employees were simply not ready to accept it. Therefore, he made the decision to honor the culture which had been established under the predecessor's collective-bargaining contract.

Yet, despite the change's apparent clarity, in a very real way, the decision can be viewed as no change at all. After all, the established practice (as opposed to nascent policy) was to grant the Friday after Thanksgiving as a paid holiday. Although the change had been announced, Respondent had never actually implemented its desired plan of requiring work that day. Indeed, insofar as the unionized portion of the auto repair service trade is concerned, the paid day off was the industry norm. Meeting that standard was an acceptance of the status quo.

In another way, Respondent may well be viewed as having accepted a fait accompli levied on it by the employees. It had no real other choice. It certainly did not seek to grant the paid holiday out of a sense of altruism or duty. It only responded to an employee-generated threat to refuse to work that Friday. Given the fact that the employees, apparently led by their shop steward, were seeking to maintain what they viewed as a long-established benefit, it can hardly be said that this employer's response was either intended to or actually had the effect of undermining the Union. Instead, the employees, led in a collective effort by their steward, were able to maintain a standard established by the Union.

In fact, one may properly ask whether any different response would have been given by the Union had Potter asked. Potter's question would have been, 'Is it okay to give the employees to a paid holiday on the day after Thanksgiving?' The Union would either have said that it was or it wasn't. If the Union had given its approval, the employees would have received exactly what they did receive, a day off with pay. If the Union had said no and asked to bargain about it, the employees would have remained disgruntled, and the Union would have risked their disfavor. The likelihood that the Union would have said no is virtually nil. Therefore, as a practical matter the employees achieved exactly what the Union would have asked for, and they did it with the leadership of their union steward. How such a result is contrary to the Union's institutional interest escapes me.

For practical reasons I conclude that this matter simply does not rise to the level of an unfair labor practice. A cease-and-desist order would not accomplish anything and an affirmative remedial order would not accomplish much, either. I shall recommend that the complaint be dismissed insofar as the day after Thanksgiving is concerned.

With respect to Christmas Eve, the result must be the same, albeit for a different reason. Here, when Respondent established its initial terms and conditions through its handbook, it reserved the right to grant a paid holiday between Christmas

[11] The only caveat might be that management could not use it in a discriminatory fashion. Such a contention has not been made here, nor does the evidence suggest that the program was abused in such a way. Indeed, such a claim would require the invocation of a different section of the Act.

Eve and the end of the holiday season. When faced with the same sort of employee dissatisfaction as a result of its posted schedule, Respondent simply exercised the right it had reserved to itself to grant a paid holiday during that period. No change of any kind ever occurred, for its conduct was an integral part of its initially established terms and conditions. No complaint can be made concerning the addition of this paid holiday. This matter, too, will be dismissed.

Insofar as the change in the pay periods is concerned, I am less impressed with Respondent's explanation. There is no question that the frequency of wage payments is a mandatory subject of bargaining. *S & I Transportation, Inc.*, 311 NLRB 1388 (1993) (presenting employees and union with change from 1-week pay period to a 2-week pay period an unlawful fait accompli and is a breach of the bargaining obligation under Section 8(a)(5).) Cf. *South Carolina Baptist Ministries*, 310 NLRB 156, 188 (1993) (employer changed from 1-to 2-week pay periods during negotiations without bargaining to impasse.)

Here, as a result of an administrative convenience to itself, Respondent inflicted an inconvenience upon its employees. Prior to the change, the employees had relied on Friday paychecks covering a full week's work. The employees had come to plan their personal finances around receipt of that full check. On that Thursday, January 10, Respondent provided them with only a 3-day check, causing consternation and complaint. The complaint was legitimate and led Respondent to provide short-term loans to over half the staff to cover their shortfall.

The pay period alteration was a significant event and constituted a material and substantial change in the employees' terms and conditions of employment. Moreover, it occurred in the normal course of things, not compelled by any unusual business circumstance. Despite that, Respondent failed to notify the Union of its intent. It acted as if the Union was not on the scene or did not represent the employees who would be affected by the change. Rather obviously, had the Union been notified, the switch could have been accomplished more smoothly. Indeed, the 2 days' pay now hidden in the holdback may well have been paid out without the necessity for the advances or the employees' having been shorted at all. The crude matter in which Respondent carried out its changeover could have been avoided entirely. Certainly the Union was not obligated to accept such a fait accompli. Furthermore, ignoring the Union as it has, clearly has the tendency to undermine the Union's status in the eyes of the employees. This is a classic unilateral change requiring a remedy under Section 8(a)(5).[12]

In addition, the complaint asserts that each of the incidents set forth as unlawful unilateral changes also constituted unlawful direct dealing. With respect to the allegations concerning the productivity bonus programs and the paid holiday issues I am unable to concur with the General Counsel's complaint. Simply notifying the employees that a unilateral change will affect them does not constitute unlawful direct dealing. *Johnson's Industrial Caterers*, 197 NLRB 352 (1972). There, the Board adopted Trial Examiner Henry Jalette's decision where he said (id. at 356):

> The unilateral changes announced on July 9, which I have found violative of Section 8(a)(5) because they were instituted without notice to or consultation with the majority representative, are also alleged . . . to be violative of Section 8(a)(5) on the ground that when Respondent met with the employees on July 9 and announced the changes in method of operations, and when thereafter it discussed with employees problems that arose under the new system, it was engaged in direct dealing with the employees in derogation of the status of the Union as majority representative. Of course, the unilateral conduct derogated from the Union's status as majority representative and little is added either to the remedy in this case or the body of law on the subject to find a violation on the theory of direct dealing. In my judgment, the conduct of Respondent did not constitute direct dealing with employees in the sense in which the term is normally used. Respondent was not making offers to employees seeking acceptances, nor was it seeking to induce employees to repudiate the Union. While the effect of its unilateral change in working conditions was to undermine the Union, I cannot see how the implementation and announcement of what was clearly a predetermined course of action constituted direct dealing. *Huttig Sash & Door Co.*, 154 NLRB 811, 817 (1965). Compare *Dan Dee West Virginia Corp.*, 180 NLRB 534, 539 (1970).

Assuming that the employees were actually victims of a unilateral change with respect to the productivity bonus and holiday pay matters, Respondent simply announced the changes and did not bargain with the employees of all. Making the same observation as Trial Examiner Jalette did in *Johnson's*, I observe that Respondent simply followed a predetermined course in implementing them. There can be no direct dealing violation in such a circumstance.

The same cannot be said for the change in pay period. Not only did it constitute an unlawful unilateral change, Respondent dealt directly with those individuals who faced a hardship, offering them a loan to cover the change in payday and lost 2 days' wages. In directly dealing with its employees in this fashion and without involving the Union in its transactions concerning their pay matters, Respondent violated Section 8(a)(5) of the Act. The Union was the 9(a) exclusive collective-bargaining representative of the employees. Respondent had the obligation to deal with it, not skip it or act as if it had no role in such matters. See *Blue Circle Cement Co.*, 319 NLRB 954 (1995). There, the Board not only found unlawful a

[12] "An employer must inform the union of its proposed actions under circumstances which at least afford a reasonable opportunity for counter arguments or proposals." *NLRB v. Centra*, 954 F. 2d 366, 372 (6th Cir. 1992). "If a policy is implemented too quickly after notice is given, or an employer has no intention of changing its mind, the notice constitutes nothing more than informing the union of a fait accompli." Id. Also, *Roll & Hold Warehouse & Distribution Corp.*, 325 NLRB 41 at 42 fn. 4 (1997), enfd. 162 F. 3d 513 (7th Cir, 1998): "By announcing the [wage increase] to the [Union] at the same time as all other employees, the respondent essentially ignored the representative status of the employees' bargaining agent. Such failure to acknowledge the [Union's] proper role in negotiating terms and conditions of employment severely diminished, if not effectively foreclosed, any meaningful opportunity for the [Unions] to exercise [their] authority in this matter."

unilateral change in the starting time for a shift, in addition it found that the respondent had committed a direct dealing violation under Section 8(a)(5) when discussing with union-represented employees their preference concerning earlier start times on other shifts. Accordingly, Respondent's offer of loans to cover the pay shortfall was unlawful direct dealing.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The affirmative action will include an order to post a notice to employees advising them of the remedial steps it will take. It shall also require Respondent to pay the employees the 2 days' wages it improperly placed into the holdback account when it changed payroll periods in January 2002, together with interest on the amount improperly withheld. Interest will be calculated under *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Based on the foregoing findings of fact and the entire record in this case, I hereby issue the following

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to prove by credible evidence that Respondent threatened to discharge its employee Keith Scarboro in violation of Section 8(a)(1) of the Act.

4. Respondent did not violate Section 8(a)(5) when it modified its productivity bonus program, when it granted its employees a paid holiday on the day after Thanksgiving 2001 or when it granted its employees a paid holiday for Christmas Eve 2001.

5. Respondent violated Section 8(a)(5) and (1) of the Act when, on January 9, 2002, it unilaterally changed the payroll period, causing employees to receive short paychecks and rolling the amount owed them into the pay holdback.

6. Respondent, on January 9, 2002, violated Section 8(a)(5) and (1) by dealing directly with employees in the collective-bargaining unit with respect to pay matters.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

Respondent, Sonic Automotive, formerly d/b/a Capitol Ford, currently d/b/a Friendly Ford, San Jose, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making unilateral changes in the payroll period or in other terms or conditions of employment covering bargaining unit employees, without prior notice to or bargaining with the Union as their exclusive collective-bargaining representative.

(b) Dealing directly with bargaining unit employees with respect to their rates of pay, wages, hours, or other terms and conditions of employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the Board's decision, pay to the employees in the bargaining unit, together with interest, the 2 days' wages placed in the payroll holdback account in January 2002, together with interest as set forth in the remedy section of this decision.

(b) Within 14 days after service by the Region post at its business in San Jose, California, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 32 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since January 9, 2002.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

Dated, February 28, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose not to engage in any of these protected activities.

WE WILL NOT make unilateral changes in the payroll period or in other terms or conditions of employment in the bargaining unit of our employees represented by the International Association of Machinists & Aerospace Workers, District Lodge 190, Local Lodge No. 1101, AFL–CIO, without prior notice to or bargaining with that Union as your exclusive collective-bargaining representative.

WE WILL NOT deal directly with respect to rates of pay, wages, hours, or other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7.

WE WILL pay the employees in the bargaining unit the 2 days' wages which we placed in the payroll holdback account in January 2002, together with interest.

SONIC AUTOMOTIVE, FORMERLY D/B/A CAPITOL FORD, CURRENTLY D/B/A FRIENDLY FORD